CHEAH TJENG SIONG

v.

LIM SIN OO & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[BANKRUPTCY NO. 29-787-89]
7 JANUARY 1991

CIVIL PROCEDURE: *Sale of land - Failure to complete - Decree of specific performance - Non-compliance - Bankruptcy notice issued - Whether creditor allowed to do so - Requirement of order for specific performance - Registrar's certificate - Time and place for completion - Formal order required.*

The judgment creditors C were owners of land who had agreed to sell it to the judgment debtor D; D failed to complete the contract and C sought specific performance of the contract and an order for summary judgment under O. 81 of the Rules of the High Court 1980 (RHC); this was granted and specific performance was ordered; C also had to execute a conveyance of the land upon payment by D of a certain sum of money. D failed to pay the latter amount and C issued a bankruptcy notice which D now seeks to set aside the notice on the ground that it was not open to C, as vendors of land who had obtained a decree of specific performance of the contract for sale of land against D as purchaser, to enforce the same by recourse to bankruptcy proceedings.

Held:

[1] (a) When an order for specific performance of a contract for the sale of land is made, the contract continues to exist and is not merged in the order;

(b) once an order for specific performance has been made, there are adequate remedies available to either party if the other does not appear to be proceeding under the order with due dispatch;

(c) by applying for an order for specific performance and obtaining it, the applicant has put it in the hands of the Court how the contract is to be carried out - the Court has become seized of the matter, and has made an order, subject to anything the parties may then agree, the working out or variation of that order is in the hands of the Court.

[2] It is clear law that if a defendant fails to comply with an order for completion, the plaintiff cannot immediately proceed to execution but must first apply, either by summons or motion, for a further order directing the defendant to complete.

[3] (a) In the present case, the judgment for specific performance did not fix the date for completion nor had a Registrar's certificate been obtained for the fixing of a time and place for completion;

(b) even if a Registrar's certificate had been obtained, the vendors in this case should have gone further and obtained a formal order fixing a time and place for completion, since a Registrar's certificate is not an order and so is incapable of being disobeyed.

[4] At the date of the issue of the bankruptcy notice, C was not in a position to commence execution proceedings and it was not open to them to issue a bankruptcy notice.

[5] Therefore, the question of whether it was open to C to enforce the judgment for specific performance by recourse to bankruptcy proceedings does not arise.

[D's application allowed; bankruptcy notice and petition set aside.]

Cases referred to:
Palmer v. Lark [1945] Ch 182
Morgan v. Brisco [1886] 32 Ch D 192
Re Tuck [1906] 1 Ch 692
Cotton v. Heyl [1930] 1 Ch 510
Capital and Suburban Properties Ltd. v. Swycher and Ors. [1976] 1 All ER 881
Sudagar Singh v. Nazeer [1978] 3 All ER 817
Austins of East Hams Ltd. v. Macey [1941] Ch 338
Johnson v. Agnew [1979] 1 All ER 883
Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd. [1990] 3 CLJ (Rep) 349

Legislation referred to:
Rules of the High Court 1980, O. 42 r. 6, O.81

Other sources referred to:
Atkins Court Forms Vol. 37(2nd Edition), p. 36
Procedural Steps 56 to 59, pp. 49 & 50
Specific Performance by Fry, 6th Edn., (1921), pp. 546-543
Vendor and Purchaser Williams, 4th Edn., (1936), p. 1064
Chancery Masters' Practice Forms, Form No. 32

For the Judgment Debtor - Ranjit Singh and later R.R. Sethu (R. Rajasingam with him); M/s. Rajasingam & Co.
For the Judgment Creditors - Karin Lim Ai Ching; M/s. Presgrave & Matthews

JUDGMENT

Edgar Joseph Jr J:

This was an application by a judgment debtor to impugn a bankruptcy notice on the ground that the judgment upon which it was founded was not a final judgment which finally determined the rights of the parties nor did it finally determine the matters in dispute between the parties, it being merely a judgment for specific performance of a contract for sale of land entered in favour of the vendors who are the judgment creditors against the purchaser who is the judgment debtor.

The factual situation is simple and may be shortly stated. The judgment creditors were owners of certain land and had contracted to sell it to the judgment debtor at a price of RM999,999 but the latter failed to complete the contract so the judgment creditors caused to be issued a writ of summons for specific performance of the contract and also a summons for summary judgment under O. 81 of the Rules of the High Court 1980, that the contract be specifically performed. After hearing Counsel on both sides, my brother Wan Adnan had decreed specific performance and further ordered that upon payment of the balance of the purchase price of RM599,100 the judgment creditors were to execute a conveyance of the land with vacant possession.

The judgment debtor having failed to pay the balance of the purchase price, the judgment creditors caused to be issued a bankruptcy notice dated 22 June 1989 which was duly served upon the judgment debtor. The judgment debtor then applied to set aside the bankruptcy notice.

More particularly, the argument before me revolved around the question whether it is open

to the judgment creditors who, as vendors of land, had obtained a decree for specific performance of the contract for sale of land against the judgment debtor, as purchaser, to enforce the same by recourse to bankruptcy proceedings.

Since reserving judgment, however, a new point of law - not raised by either Counsel, and details of which appear hereafter - had occurred to me. That being so, I invited Counsel to address me on it and they did so.

My own researches into the authorities show that it is clear law that if a defendant fails to comply with an order for completion, the plaintiff cannot immediately proceed to execution (see *Palmer v. Lark* [1945] Ch 182) but must first apply for a further order directing the defendant to complete (see *Morgan v. Brisco* [1886] 32 Ch D 192). The application may be made by summons or motion. (see, for example, *Atkins Court Forms* Vol. 37 (2nd Edn.), (1981 issue) Form 95 p. 132).

In practice, a judgment for specific performance usually fixes a date for completion of the contract by payment of the purchase price against the delivery of the executed conveyance, or other instrument and all documents of title to which the purchaser is entitled. (see *Atkins Court Forms* Vol. 37 (2nd Edn.), p. 36 and the *Procedural Steps* 56 to 59 at pp. 49, 50). The time is commonly four days from service of the order (RHC O. 42, r. 6 and see *Re Tuck* [1906] 1 Ch 692) though of course other periods of time may be specified. However, if this is omitted, the omission can always be cured by a subsequent order. (see *Cotton v. Heyl* [1930] 1 Ch 510). I need hardly add that in order to enable execution to be enforced, the order must be served personally on the individual against whom execution is sought and must be endorsed with a penal notice; that is to say, that if the defendant fails to obey the order within the time specified he is liable to process of execution to compel him to obey it. (see RHC O. 45, r. 7(4)). In a vendor's action it is more common to enforce the order by one or more of the various forms of execution available for the enforcement of a money judgment. (see RHC O. 45 r. 1). So, for example, in *Capital & Suburban Properties Ltd. v. Swycher and Ors.* [1976] 1 AER 881 at 888 Sir John Pennycuick said,

> But what is the position if the purchaser fails to comply with the decree? It is not in dispute that in these circumstances the vendor may forfeit the deposit: *Hall v. Burnell* [1911] 2 Ch 551; he may claim liquidated damages under an express provision in the contract (where available): *Griffiths v. Vezey* [1906] 1 Ch 796 and he may levy execution in respect of the money payable by the purchaser under the decree: *Fry on Specific Performance* 6th Edn., (1921) p. 547; Williams on *Vendor and Purchaser* 4th Edn., (1936) p. 1064.

And, in *Sudagar Singh v. Nazeer* [1978] 3 AER 817 at 821, Megarry VC said this:

> when an order for specific performance of a contract for the sale of land is made, the contract continues to exist and is not merged in the order. This I think sufficiently appears from *Austins of East Hams Ltd. v. Macey* [1941] Ch 338. Secondly, it also seems clear that once an order for specific performance has been made, there are adequate remedies available to either party if the other does not appear to be proceeding under the order with due dispatch. Thus an application may be made for time and place for completion to be fixed, or for an order rescinding the contract either forthwith if the other party is refusing to complete, or else in default of completion within a time limited. I need not set out all the possibilities in detail; they appear in *Fry's Specific Performance* 6th Edn., [1921] pp. 546-553 and see *Capital and Suburban Properties Ltd. v. Swycher* (*ibid*). By applying for an order for specific performance and obtaining it, I think that the applicant has put it in the hands of the Court how the contract is to be carried out. As the Court has become seized of the matter, and has made an order, it seems to me that subject to anything the parties may then agree, the working out or variation of that order is in the hands of the Court.

In *Johnson v. Agnew* [1979] 1 AER 883 at 890, Lord Wilberforce referred to what Megarry VC said as "undoubted law".

In the present case, the judgment for specific performance does not fix the date for completion nor had a Registrar's certificate been obtained fixing a time and place for completion. (For a form of such certificate adopted from *Chancery Masters' Practice Forms* see Form No. 32 reproduced in Form 94 p. 130 *Atkins Court Forms* Vol. 37, 2nd Edn., Vol. 37 (1981 issue)). In my view, even if a Registrar's certificate had been obtained, the vendors in this case should have gone further and obtained a formal order fixing a time and place for completion, since a Registrar's certificate is not an order and so is incapable of being disobeyed. (see pp. 36, 37 Atkins *ibid*).

For the foregoing reasons, I am of the opinion, that in the particular circumstances of the present case, as at the date of the issue of the bankruptcy notice, the judgment creditors were not in a position to commence execution proceedings, and it was not open to them to issue a bankruptcy notice. As I said in the *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd.* [1990] 3 CLJ (Rep) 349.

> it seems to me that a reading of the three judgments in that case makes it clear that the Court of Appeal held (as I have already said) that on the proper construction of the subsection concerned, to entitle a creditor to issue a bankruptcy notice he must be in a position to issue execution on his judgment at the time when he issued his bankruptcy notice.

Accordingly, on this ground alone I would allow the application and set aside the bankruptcy notice with costs. In consequence, the bankruptcy petition is also set aside.

In the circumstances, the question whether, assuming the judgment creditors had obtained a supplemental order fixing the time and place for completion, before issuing the bankruptcy notice, it was then open to them to enforce the judgment for specific performance, by recourse to bankruptcy proceedings, does not arise and I express no opinion upon it.

Also found at [1991] 1 CLJ 726